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No. 85-1748

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

THE SECONDARY LEAD SMELTERS ASSOCIATION, INC.,
and
GULF COAST LEAD COMPANY, INC.
Petitioners,

v.

WILLIAM D. RUCKELSHAUS, *et al.*,
Respondents.

BRIEF OF AMICUS CURIAE AMERICAN IRON AND STEEL INSTITUTE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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INTRODUCTION AND STATEMENT OF INTEREST OF AMICUS CURIAE AMERICAN IRON AND STEEL INSTITUTE

Amicus Curiae American Iron and Steel Institute ("AISI") respectfully submits this brief in support of the Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit that the Secondary Lead Smelters Association, Inc., and Gulf Coast Lead Company, Inc., filed in this proceeding on April 24, 1986. For the following reasons, the petitioned writ of certiorari should be granted.

AISI is a trade association whose member companies produce approximately 80 percent of the steel made in the United States. AISI member companies are subject to a number of environmental regulations promulgated by the U.S. Environmental Protection Agency ("EPA"), including effluent limitations guide-

lines issued under the same statute as those involved in this proceeding.

Many of the statutes under which these environmental regulations are issued require EPA periodically to review the regulations and revise them when necessary. *See* 33 U.S.C. § 1311(d). Such revision would involve rulemaking proceedings by EPA.

AISI member companies thus have a legitimate interest in the proper review by federal appellate courts of rules promulgated by EPA under environmental statutes and hence in the judicial review and notice and comment issues involved in this case.

II. STATEMENT OF THE CASE

The Statement of the Case set forth at pages 2 through 13 of the Petition is incorporated herein by reference.

III. SUMMARY OF ARGUMENT

The court below failed to review with adequate care the rulemaking record with respect to a challenged rule. The court gave short shrift to several of the petitioners' arguments and ignored others.

The failure of the court below to consider the petitioners' notice and comment argument is especially egregious and could have an adverse effect upon the due process rights of the regulated community in subsequent cases. The fundamental role notice and comment procedures play in federal rulemaking, the error of the court in ignoring this issue, and the precedential significance of the court's decision make it appropriate and desirable for the Court to grant the requested writ.

IV. ARGUMENT

1. The Failure of the Court of Appeals Properly to Discharge its Judicial Review Responsibilities Requires This Court to Grant the Requested Writ

As set forth in the Petition, the court below failed to address several key arguments petitioners made regarding the EPA rulemaking. First, the court refused to address petitioners' primary contention that EPA improperly distorted the data upon which it based its lead concentration limits and improperly ignored data that the industry had submitted. (Petition at 10-12.) The court also ignored petitioners' challenge to EPA's adoption of filtration as the model technology for the industry.

2. The Violation of Petitioners' Notice and Comment Rights Requires the Court to Grant the Writ

The court failed to address petitioners' argument that EPA violated the notice and comment requirements of the Administrative Procedure Act ("APA"). The notice and comment procedure is fundamental to federal rulemaking. This Court should not allow federal appellate courts to ignore agency failure to follow notice and comment requirements.

The opportunity to receive notice of, and to provide comment in, an agency rulemaking is required by the APA. *See* 5 U.S.C. § 553. The notice and comment requirement exists to ensure that affected parties have an opportunity to participate in rulemaking proceedings. *Lloyd Nolan Hosp. & Clinic v. Heckler*, 762 F.2d 1561, 1565 (11th Cir. 1985).

When an agency bases a rule on scientific or empirical data, the agency must disclose this data and the methodology upon which it is predicated. *See, e.g.*,

id. at 1565 ("(w)hen a proposed rule is based upon scientific data, the agency should identify the data and methodology used to obtain it"); and *United States v. Nova Scotia Food Products Corp.*, 568 F.2d 240, 251 (2nd Cir. 1977). An agency cannot promulgate rules based upon data of which it alone is aware. *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 393-394 (D.C. Cir. 1973), *cert denied*, 417 U.S. 921 (1974).

As put forth in the Petition, the EPA violated this principle in the rulemaking proceeding involved in this case, and the Court of Appeals failed to correct this error.

V. CONCLUSION

For the foregoing reasons, the Court should grant the requested writ.

Respectfully submitted,

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